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Student Writing Competition in Bioethics

REPRODUCTIVE CLONING CASE: HOW LAW AND BIOETHICS MEASURE A COMPELLING GOVERNAMENTAL INTEREST

by

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1. Bioethics, Cloning for Reproduction, and Law

During the last decades, the international community took notice of spectacular progresses in the field of molecular biology, specially in genetic engineering. What seemed impossible to man's knowledge – the key of life's mystery – has begun to be unmasked. These promising progresses catch unaware the sciences of the right conduct – Law and Ethics. Thus, the innovations emerge a set of inquiries regarding to the limits of a human being's actions in genetic engineering.

Particularly, in this essay, we will discuss the ethical limits to genetic research in cloning human beings, taking in account the guidelines established in the President Council of Bioethics, the Belmont Report and other Bioethics Committees as **a means of defining legal protection of compelling governmental interest**. Must there be legal limits to clone human beings for reproduction according to the ethics of the Belmont Report? If the answer is affirmative, what should they be? Is it possible to use cloning as a legal option of human reproduction according to the implied fundamental rights doctrine?

Other comments will focus on the President Council of Bioethics (PCB) Report's assessment of ethical arguments for and against cloning-to-produce-children as the latest report about this issue.¹

The answers to the questions raised are important, as we consider the role of bioethics in defining parameters for biomedical advances.²

In the first lines of **Nichomachean Ethics**, Aristotle introduces the definition of ethics and its purposes, the notions of political science, of Good, of Beauty, of Justice, as well as of Humanity.³

Therefore, Ethics and Bioethics can be understood as a theory of practical means. The concept was illustrated by Socrates' dialogue “Crito”.⁴ The term “ethics” comes from the Greek radical *ethos*, which means "habit." In strict terms, and in a simplified vision, the moral philosophy (or ethics) allows reaching the correct conduct in a group.

In that sense, especially for the beginning of Bioethics, it is important to emphasize “The Belmont Report” as the landmark in discussing “Ethical Guidelines for the Protection of Human Subjects”.⁵ Published in 1978, the Report used three basic guidelines in reaching a correct conduct:

- respect for people (related to the concept of human dignity);
- beneficence (to maximize the good and to minimize the evil. In the context of the medical professional, it is to act always in the patient's favor); and
- justice (to make welfare a good for everyone).

Regarding the **respect for people** (also called respect for a person's autonomy), the Belmont Report incorporates, at least, two ethical beliefs: that the individuals should be treated as autonomous agents and that people with reduced autonomy should be protected. This implies two separate and correspondent moral demands: the demand for the recognition of the autonomy and the demand for protecting those with reduced autonomy.

An autonomous person is an individual capable of deliberating on his personal objectives and of acting according to this deliberation. To respect the autonomy is to value free will, in other words, it is to avoid interference or control of actions, unless they are clearly harmful to other people. Violations of this guideline are disrespecting someone's judgments, denying the freedom of acting, or omitting necessary information allowing a reasonable judgment.

Beneficence is within the proposition of the Hippocratic Oath, in paragraph 7: "Into as many houses as I may enter, I will go for the benefit of the ill".⁶ Therefore, the doctor's oath is aimed of helping the patient and not at harming him more.

Justice in the Belmont Report is concerned with fairness in distribution. Is it correct to spend a lot of money in one patient's treatment, when there are so many patients that do not have any kind of medical assistance? The solution to such issues must be determined by public policies enforced by Law.

Another important aspect is the correlation between Ethics and Law in the discussion of health themes. For instance, the Brazilian Resolution of the Federal Council of Medicine (an ethical council) establishes a "Criteria for the characterization of encephalic death" because it was ordered by article 3 of Federal Law n. 9.434 (1997). This statute, when regulating body transplants, determines that the Federal Council of Medicine must define the criteria for diagnosis of encephalic death, attributing to the Council the establishment of ethical content (Ethics) which enforces a Federal Statute (Law).

Human Cloning for procreation⁷ requires the building of a critical collective conscience of values regarding genetic human research and respect for people. Generally, the mass media only shows a dualistic or religious vision dividing genetic research between good (“miracles of science”) and evil principles (“apocalyptic risk of research”), subtracting the possibility of a reasonable discussion based in consolidated rational ethical principles as the Belmont Report that should guide Law in enforcing human behavior.

Furthermore, in Law and Ethics, the protection of freedoms and fundamental rights, inherent to humanity, should be the common guidelines for regulation of new social facts, such as cloning.

2. Dolly and the ethical cloning debate : Is cloning a compelling government interest?

The cloning of the sheep Dolly and its subsequent death, which unsettled the scientific community and public opinion, renew the discussion of genetic manipulation. We will analyze this relevant subject in the context of the Belmont standards as a system of measurement the necessity of government intervention.

Why is Dolly so special? Dolly is not an ordinary sheep, produced through the mating of an ewe and a ram. She is a clone, an exact genetic replica of her donor "mother," a six-year-old female sheep. And that fact brings another one: technically, can we clone another mammal, such as human beings? Is that legal, according to the ethic framework of the Belmont Report?

Dolly exposes the discussion concerning the cloning of human genes. The ethical controversy over any future experiments that involve the cloning of human beings – which has not yet

occurred – is likely to dominate law debates all over the world. Before engaging in such a debate, it is important to understand some of the key questions that Dolly raises.

In 1999, a research that was published in the journal *Nature* suggested that Dolly may have been susceptible to premature aging, due to shortened telomeres in her cells. It was speculated that these may have been passed on from her “parent”, who was six years old when the genetic material was taken from her, so that Dolly may have been genetically six years old at birth.⁸

Oppositioners of cloning counter that cloning must be denied to human beings. They contend that with our very limited understanding of the emerging field of applied genetics, we cannot, and should not, attempt to control the action of so many new variables at once. According to this argument, any form of cloning is ethically wrong and should be banned.⁹

In a contrary manner, supporters of cloning say that the technique used to clone Dolly simply needs to be refined and might be used in human beings.¹⁰

3. Implied human rights doctrine and limits to human cloning in the American Legal System: the negative and positive rights of sexual procreation doesn't include cloning reproduction.

Law protects human beings, not only in the individual's interest, but also in the interest of society. In these circumstances, cloning should be investigated according to constitutional values that protect human dignity for the whole nation.

Obviously in a 1789 Constitution, there is no constitutional clause concerning human cloning or genetic engineering or reproductive methods. Human rights, in the American Legal System, are

evolved by constitutional interpretations during the latter half of the 20th century in a doctrine called “implied fundamental rights”.

The fourteenth amendment has become the single most important vehicle for the protection of implied fundamental rights. For example, in *Brown v. Board of Education*,¹¹ the United States Supreme Court began to clarify the central role that the fourteenth amendment would play in enabling all citizens to derive maximum benefit from the public educational system. In that decision, the Supreme Court delivered the opinion that the right to education is implicit in the due process of law clause. The implied fundamental rights doctrine asserts that there are certain rights so fundamental to individuals that, even though they are not described or enumerated in any constitutional clause, they deserve the protection of the 14th Amendment’s Due Process Clause.

The clause prohibits the government from depriving a person of life, liberty, or property without due process of law, and was thus used for bioethics matters such as protect procreative liberty,¹² marital relationship,¹³ and the right to abortion,¹⁴ themes similar to human cloning as a tool for childbearing decisions.

During the right to abortion debate (*Roe v. Wade* (1973)), in which the Court assigned, using the due process, privacy or liberty of the woman to choose to have an abortion, the state asserted an interest in protecting the rights of the fetus. Justice Blackmun rejected the argument that the fetus was a person for purposes of Fourteenth Amendment protection. Relying on various provisions including the definition of citizens in the Fourteenth Amendment, the census provisions, and the

qualifications for various elected officials, Justice Blackmun concluded that the Constitution only protected those who were already born. By focusing on legal personhood, the Court avoided the question of when life begins, a question that is against raised in the cloning debate.

Is a human clone a person for legal matters? In other words, is a clone something or someone that could be born? Was Dolly born? The answer would be yes, if one considers that she was delivered from a womb. Assuming that a born-clone would have legal personhood, the State should have interest in protect him and the way he was generated.

To Leon Kass, sexual reproduction is established by nature and is anthropologically connected with “childrearing responsibilities and systems of identity and relationship on the bases of these deep natural facts of begetting”.¹⁵ Thus, sexual reproduction should be a feature of human dignity and human rights.

Considering the similarity between the abortion case and cloning as reproduction issue, one could step forward: the trimester system of Roe represented the Court’s attempt to balance the woman’s interests in choosing an abortion and in controlling her body, against the states’ interests in protecting maternal health and the potential life of the fetus.¹⁶ Is it possible to have that balancing approaching in allowing cloning as a legal form of reproduction? Does the State have an interested in avoiding human cloning as an option to sexual reproduction? Is sexual reproduction an exclusive way of reproduction constitutionally protected?

The United States Supreme Court has clearly indicated that **humans have the right not to reproduce (negative right)**, as evidenced by contraceptive cases such as *Griswold v.*

*Connecticut*¹⁷ and abortion cases such as *Roe v. Wade*¹⁸ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁹

Whether the Constitution also provides an affirmative, or positive, right to reproduce is less clear because the government has rarely acted to prevent individuals from procreating or, until now, to avoid cloning as a human reproductive option; hence, there has not been litigation directly on point. Nonetheless, a large number of academic writing and cases in this area acknowledges that a positive right to sexual reproduction may be implied in American Common Law.²⁰

One of the earliest cases from which a positive right of reproduction may be inferred is the Supreme Court's 1923 decision in *Meyer v. Nebraska*.²¹ The Court invalidated a Nebraska law prohibiting the teaching of any language other than English to children prior to the eighth grade; stating *in dicta*, the Court gave content to the Due Process Clause saying that:

Without doubt, [the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, **to marry, establish a home and bring up children.**²²

The **affirmative right to sexual reproduction** was more specifically addressed by the Court's 1942 decision in *Skinner v. Oklahoma*, which struck down an Oklahoma statute mandating sterilization for repeat felons convicted of crimes involving moral turpitude. In invalidating the law, the Court invoked strict scrutiny and concluded that, because "**marriage and procreation** are fundamental to the very existence and survival of the [human] race," the mandatory sterilization law violated "one of the basic civil rights of man."²³ Thus, *Skinner* not only suggests that a positive right of sexual procreation exists, but also that it is a fundamental right entitled to

the highest level of strict scrutiny.²⁴

American Law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing. These matters, involving the most intimate and personal choices a person may make in a lifetime, which are central to personal dignity and autonomy, are also central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Skinner and other cases establish a positive right to reproduce by way of natural sexual intercourse. Forms of assisted sexual reproduction, such as *in vitro* fertilization and artificial insemination, have not yet been taken to the Supreme Court.

One might state that natural sexual reproduction is an implied fundamental right in American Legal, but the system does not allow, by itself, the possibility of artificial sexual reproduction or asexual reproduction.²⁵ The fundamental rights includes any of the rights set out in the Constitution explicitly (such as in the 1st Amendment), plus any that are not set out explicitly, but have been held to be fundamental by the Supreme Court under the *mens legis*²⁶ of the constitution (such as sexual reproduction) using the due process of law clause (fourteenth amendment).

4. Banning cloning-to-produce-children: where Law and Bioethics values converged in defining a compelling governmental interest

It should be observed that there is an intimate relationship between the Law and the Ethical analysis in matters that connect both to the protection of the most important human value: human dignity.

As Kass tries to show, using bioethics reasoning, asexual reproduction is similar to incest and other moral wrongs:

Even if human cloning is rarely undertaken, a society in which it is tolerated is no longer the same society — any more than is a society that permits (even small-scale) **incest** or cannibalism or slavery. It is a society that has forgotten how to shudder, that always rationalizes away the abominable. A society that allows cloning has, whether it knows it or not, tacitly said yes to converting procreation into manufacture and to treating our children as pure projects of our will.²⁷

Asexual reproduction is vulnerable to moral concerns and bioethics objections, as Kass remembers:

“(1) cloning threatens confusion of identity and individuality (...) (2) cloning represents a giant step (...) toward transforming procreation into manufacture (...) (3) cloning (...) represents a form of despotism of the cloners over the cloned, and thus (even in benevolent cases) a blatant violation of the inner meaning of parent-child relations (...)”²⁸

Human cloning is comparable to incest: both are methods of reproduction that produce offspring with such similar genetic material that the lines of generation are unclear. Generational lines mix

through incest when a child's father could also be his uncle, and through human cloning, when a child's mother could also be considered her identical twin.

As a method of reproduction, American Law treats incest as a crime,²⁹ a form of reproduction that must be condemned and banned. The potential social harms or physical risk to children conceived through incest are the reason for this public policy oriented to protect the child's dignity. Thus, there is a compelling governmental interest in avoiding incest. By legal analogy, cloning-to-produce-children should be banned, too.

Using different words, but with the same concern in the clone's human dignity, the President's Report Council analyzes human reproductive and human therapeutic cloning (by the Council called 'cloning-to-produce-children' and 'cloning-for-biomedical-research', respectively).³⁰

The report's title suggests that human cloning will be evaluated in light of a conception, or different conceptions, of 'human dignity'. This concept is widely invoked in human rights, Law and secular arguments to legitimize government intervention in establishing limits to biotechnology .

In an added foreword, Council chairman, Leon Kass, stated:

But the controversy surrounding human cloning and the widespread sense of disquiet and concern with which the prospect has been received around the world, make it clear that cloning is not just another reproductive technology, to be easily assimilated into ordinary life. Nearly all participants in the public debate over human cloning appear to agree that the subject touches upon some of the most fundamental questions regarding the nature of our humanity and the character of our society.³¹

The National Bioethics Advisory Commission (NBAC),³² the predecessor of President George W. Bush's President's Council, using the beneficence principle, concluded that the “creation of a

child” by somatic cell nuclear transfer is scientifically and ethically objectionable at this time. NBAC recommended that the existing moratorium on attempts to create a child through cloning be continued and that the president immediately ask for voluntary compliance by the private sector. NBAC also recommended that federal legislation be enacted to prohibit anyone from attempting, whether in research or clinical setting, to create a child through somatic cell nuclear transfer cloning.³³

In a different way, The President’s Council, with regard to cloning-to-produce-children, reviews a very broad range of arguments for and against this procedure, but those that eventually carry most weight are directly related with the Belmont Report guidelines:

1. the Council thinks that the **right to procreate is not absolute** but is **limited by considerations of the welfare of the child** that is produced [justice];
2. there are reasons to believe that children produced by cloning **will be harmed** in a variety of ways [beneficence]; and
3. whereas some of these harms may disappear if cloning techniques are perfected, some are likely to persist and **affect the future newborn quality of life** [respect for people, people with reduced autonomy should be protected] .³⁴

Cataloguing those arguments and correlating them with the Belmont Report guidelines, it is possible to infer that the Belmont Report, as a landmark in Bioethics History, influenced the Council’s arguments banning cloning for reproduction purposes unanimously.

Also, “the interests” or “welfare of the child” or “**human dignity of the child**” or **compelling governmental interests** are central to the discussion of the cloning ethics of reproduction in the Report.³⁵ The issue concerns with the interests and welfare of the child who may be born as a

result of the decisions that someone makes. Here the question to be addressed is what should we do, or permit to be done, if we care about that child's interests?

Peter Berkowitz answered the question according to the Council's discussion:

What united the council members in voting to ban such cloning altogether were concerns about the consequences that flow from "the idea of designing and manufacturing our children." While recognizing the claims of parents' freedom to choose and the claims of parents' happiness or wellbeing, the council members concluded that cloning -to-produce-children "is not only unsafe but also morally unacceptable." Cloning human children will of necessity involve using human beings as "experimental guinea pigs for scientific research," requiring much trial and error; experimentation that has already been performed with animals suggests that a huge percentage of deformed fetuses and severely impaired viable babies would result. Moreover, cloning children will encourage parents to see their children as a function of their deliberate choice and will, rather than as independent beings arising as a gift from a man and a woman freely giving themselves to each other in love. It will deprive the cloned children of the sense of a unique identity and individuality. It will create treacherous family dynamics because a child that is cloned with the cells from one of his or her parents will have a vivid biological tie to that parent (its genetic double) and no genetic tie at all to the other. And through its endorsement in law of the design and manufacture of children, the cloning of children may well put society at risk by coarsening our sensibilities and inclining us to transfer even more terms and styles of thinking and ways of judging drawn from production and commercial life into the realm of intimate relations.³⁶

Hence, the respect for people, Belmont's expression to human dignity, constitute the core discussion in the National and President Council. What is the reason for that? The answer is that human dignity integrates Law and Bioethics in limiting biotechnology abuses.

Bioethics has been recognized to address fundamental questions: such as what should individuals and society do, permit, tolerate or prohibit in biosciences, particularly affecting existing and future human beings? In offering language of consistent criticism, bioethics also offers language for legal explanation and justification to ban cloning to reproduction means.

5. Conclusion

Bypassing sexual reproduction should not be a legal option in the U.S. Although sexual reproduction is considered an implied human right by the American Case Law System, this fact is not enough to grant reproductive-human-cloning, an asexual form of reproduction, as an implied human right doctrine. Once we grasp the importance of distinguishing sexual reproduction from asexual reproduction, the implied human right doctrine can not be applied to cloning-to-reproduce-children. The affirmative right to sexual reproduction constructed by the Supreme Court connects marriage and procreation, and in doing so emphasizes only sexual reproduction. The negative right of the reproduced, evidenced by contraceptive cases such as *Griswold v. Connecticut*, can not be applied for cloning, because it is not a contraceptive method.

Furthermore, asexual reproduction doesn't satisfy the requirement of the fourteenth amendment (due process of law) for the protection of implied fundamental rights. Due process of law is a balancing procedure that aims to protect individuals against state abuses. There is no abuse in banning cloning as there is no abuse in avoiding incest. Bioethics guidelines, in both cases, are disrespected. Bioethics can, and must, be used as a measure of a compelling governmental interest in protecting human welfare.

On the other hand, the breach of bioethical guidelines can limit cloning-to-produce-children as long as it measures a compelling public interest that must be addressed by a public policy to protect human dignity. Thus, if Congress enacts a ban statute, it could not be challenged as unconstitutional.

Human dignity is not a vague and obscure legal or bioethical concept. In truth, it is a way of connecting Law and Bioethics to answer questions such as the relationship between the legal protection of procreation and the Report of the President's Council banning human cloning as a reproductive option.

The Belmont Report has a “precedential effect”³⁷ in the discussion of bioethics in the United States. The rationale for having a “precedential effect” is related with the universal sense of protecting human dignity (a fundamental right with a large scope) which urges that all medical decisions are to be properly treated as a means to protect this dignity. Thus, it has influenced all the Bioethics Commissions since 1978 (such as NBAC and the President's Council). The essence of the Report's guidelines to protection of human dignity make it a source for past, present and future problems in biotechnology use.

The Belmont Report Guidelines enlighten the arguments publicized through the Report of the Presidents' Council Bioethics and other former Commissions (such as NBAC). It creates a rationale of bioethics praxis that can be used for solving different problems without forgetting the importance of human dignity concerns.

Law and Bioethics should be partners in developing public policies to deal with cloning. Law as a Government tool must enforce decisions made in Bioethics Commissions such as the NBAC and the President's Council, because the Commissions' discussions offer an array of principles to help legislators and policy makers understand how to find compelling governmental interests.

¹ The website <http://www.bioethics.gov> provides selected readings, staff background papers and working papers, and detailed transcripts of the PCB's meetings.

² Bioethics concerns with the study of the moral dimensions of life sciences (such as medicine) in an interdisciplinary approach. Contributes to the design of public policy. For examples of contributions of the National Bioethics Advisory Commission, consult Elisa Eiseman, The National Bioethics Advisory Commission: contributing to public policy .(Santa Monica: Rand, 2003).

³ Aristotle's ethics is teleological. According to Aristotle, every thing has a purpose or an end. Such as the running horse has the purpose of winning the race, people should do things that help them fulfill their humanity.

⁴ Crito is a well-known dialogue by the ancient Greek philosopher, Plato, between Socrates and his follower Crito, regarding the source and nature of political obligation. Set after Plato's Apology, in which Socrates was sentenced to death for charges of corrupting the young and for impiety, Crito tries in this dialogue to convince Socrates to escape his imprisonment and go into exile. In reply, Socrates declares the importance of obeying social rules in order to achieve the common good.

⁵ "In 1978, the National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research published the Belmont Report, introducing the principles of respect for persons, beneficence, and justice into research with human subjects--and foreclosing scenarios like the opening case. The Belmont principles have permeated clinical medicine as well. For example, recognition of the importance of freedom of choice as an aspect of respect for persons is now instantiated in informed consent documents, laws, and court rulings. Similarly, the principles of respect for persons and beneficence are institutionalized in hospital functions that monitor quality of care, such as the tissue committees that insure that surgical procedures are appropriate. Patterns of practice, professional ideals, and the everyday behavior of both doctors and patients also demonstrate the definitions and application of the principles. They show what patients expect or demand and what physicians feel obligated to do. But what the principles mean is closely bound up with the changes in medicine and the social context in which medicine is practiced. (Eric J. Cassell, "The Principles of the Belmont Report Revisited," The Hastings Center

Report 30, no. 4 (2000): 12 [database on-line]; available from Questia, <http://www.questia.com/>; Internet; accessed 14 July 2005).

⁶ HIPPOCRATES. Hippocratic Oath. Available at <<http://www.indiana.edu/~ancmed/oath.htm> >; Internet; accessed 25 August 2005.

⁷ “Human procreation provides the major context for considering the prospect of cloning, especially cloning-to-produce-children. Much of the time, most of us tend to take for granted this central aspect of human life, through which all of us come to be and through which we give birth to our posterity” (Kass, L.R., Human Cloning and Human Dignity: The Report of the President's Council on Bioethics. (New York: PublicAffairs, 2002) 7).

⁸ BBC. Is Dolly old before her time?. Available at <<http://news.bbc.co.uk/1/hi/sci/tech/353617.stm> >; Internet; accessed 25 August 2005.

⁹ E.V. Kontorovich, “Human Cloning is Inherently Unethical”, The Ethics of Human Cloning, William Dudley (Editor), An Opposing Viewpoints Series, (San Diego: Greenhaven, 2001):28-31.

¹⁰ “(...) we should reject poor arguments against cloning and in favour of caution” (John Harris, On Cloning (New York: Routledge, 2004) 143, Questia, 23 Dec. 2005 <http://www.questia.com/PM.qst?a=o&d=108026210>).

¹¹ *Brown v. Board of Education*, 349 U.S. 294 (1955).

¹² *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Skinner Court invalidated an Oklahoma statute that allowed the state to sterilize habitual criminals guilty of crimes reflecting “moral turpide”. Justice Douglas found a constitutional violation on grounds that the statute discriminate with respect to a fundamental right (“marriage and procreation are fundamental to the very existence and survival of the race”, *Id* at 541).

¹³ *Griswold v. Connecticut* 381 U.S. 479 (1965). Administrators of the Planned Parenthood League of Connecticut were arrested and charged under state statutes prohibiting the use or provision of contraceptives. The League prescribed contraceptive devices to married persons and counseled them on their use, typically for a fee. Because it significantly burdened an individual’s right to make childbearing decisions without serving a compelling state interest, the Court further broadened access to contraceptives in *Carey v. Population Services International* (431 U.S. 678 (1977)).

¹⁴ Critical to the Court's modern substantive due process jurisprudence are the cases involving a woman's right to choose an abortion. The first case to guarantee that right was *Roe v. Wade*, 410 U.S. 113 (1973). The Texas statute invalidated in *Roe* made it a crime to procure or attempt an abortion except to save the life of the mother. In *Roe*, Justice Blackmun premised the right to choose an abortion on the constitutional right of privacy which derived from the concept of personal liberty in the Due Process Clause.

¹⁵ Leon Kass, Life, liberty and the defense of dignity: the challenge of bioethics. (San Francisco: Encounter, 2002) 154.

¹⁶ *Roe v. Wade*, 410 U.S. at 174.

¹⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* and her colleague were convicted under a Connecticut law which criminalized the provision of counselling, and other medical treatment, to married persons for purposes of preventing conception. Together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marital relations. The Connecticut statute conflicts with the exercise of this right and is therefore null and void.

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Pennsylvania legislature amended its abortion control law in 1988 and 1989. Among the new provisions, the law required informed consent and a 24 hour waiting period prior to the procedure. A minor seeking an abortion required the consent of one parent (the law allows for a judicial bypass procedure). A married woman seeking an abortion had to indicate that she notified her husband of her intention to abort the fetus. These provisions were challenged by several abortion clinics and physicians. In a bitter, 5-to-4 decision, the Court again reaffirmed *Roe*, but it upheld most of the Pennsylvania provisions.

²⁰ See Elizabeth Price Foley, "Human Cloning and the Right to Reproduce", 65 Albany Law Review , 625 (2002); Kathryn D. Katz, "The Clonal Child: Procreative Liberty and Asexual Reproduction", 8 Albany Law Journal of Science & Technology, 1 (1997); Barry Brown, "Human Cloning and Genetic Engineering: the Case for Proceeding Cautiously", 65 Albany Law Review , 649 (2002); Robert P. George, "What's sex got to do with it? Marriage, Morality, and Rationality", 49 The American Journal of Jurisprudence 63 (2004).

²¹ *Meyer v. Nebraska* 262 US 390 (1923). In 1919 Nebraska passed a law prohibiting anyone from teaching any subject in any other language except English. In addition, foreign languages could be taught only after the child had passed the eighth grade. Meyer, a teacher at Zion Parochial School, used a German bible as a text for reading.

According to him, this served a double purpose: teaching German and religious instruction. The question before the court was whether or not the law violated people's liberty, as protected by the Fourteenth Amendment. In a 7 to 2 decision, the Court held that it was indeed a violation of the Due Process Clause.

²² *Meyer v. Nebraska* 262 US 390 (1923) at 399.

²³ *Skinner v. Oklahoma* at 541.

²⁴ Under strict scrutiny, a law infringing on the exercise of the asserted constitutional right will be invalidated by the court unless the government can prove that the law in question furthers a compelling governmental interest and is narrowly tailored to further that interest. Strict scrutiny is based on the 14th amendment. The Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno v. Flores*, 507 U.S. 292 at 302).

²⁵ "A more challenging question is posed by the emerging possibility of the use of asexual ARTs such as cloning or parthenogenesis. Whether the constitutional right to reproduce extends to asexual reproduction is a question that can, in the end, only be answered by engaging in a traditional substantive due process analysis, which would require a court to identify the most closely analogous protected or unprotected activity extant. The analogue chosen by the courts, moreover, will ineluctably hinge upon pragmatic, outcome-oriented considerations; hence, depending on the analogue chosen by the courts, asexual reproduction may or may not be constitutionally protected. Analogizing asexual reproduction to reproduction in general would allow a court to grant full constitutional protection to asexual reproduction, as well as sexual ARTs. On the other hand, a court could assert that asexual reproduction and sexual reproduction are apples and oranges, and that there is no currently protected activity analogous to asexual reproduction. This conclusion would be pragmatically difficult to justify given the strong similarities between cloning and existing sexual ARTs such as IVF, and could lead to the conclusion that reproduction by sexual intercourse enjoys full constitutional protection whereas non-coital reproduction (including IVF) enjoys no constitutional protection at all." (Elizabeth Price Foley, "Human Cloning and the Right to Reproduce", 63 Albany Law Review, 625, at 647 (2002)).

²⁶ A text, a tradition or a reported rule might provide access to some aspect of nature or truth, but the criteria and methods of human law tries to become conscious of the whole truth. The text was thus secondary to the meaning

(*mens legis*), the word to the spirit (*anima legis*), the language of the Constitution to the force, power or virtue that underlies its enunciation.

²⁷ Leon R. Kass, and James Q. Wilson, The Ethics of Human Cloning (Washington, DC: American Enterprise Institute, 1998) 87-88, Questia, 23 Dec. 2005 <<http://www.questia.com/PM.qst?a=o&d=97673520>>.

²⁸ Leon Kass, Life, liberty and the defense of dignity: the challenge of bioethics. (San Francisco: Encounter Books, 2002) 154.

²⁹ “California decrees that incestuous marriages within its borders are void and nonexistent from the beginning. The Family Code’s decree, quoted above, is backed up by a Penal Code provision making it a felony to enter an incestuous marriage or to engage in incestuous sexual relations”. (Michele Murray, “Problems with California’s definition of incest”, 11 J. Contemp. Legal Issues 104 (2000)).

³⁰ Kass, L.R., Human Cloning and Human Dignity: The Report of the President's Council on Bioethics. (New York: PublicAffairs, 2002).

³¹ Kass, L.R., Human Cloning and Human Dignity: The Report of the President's Council on Bioethics. (New York: PublicAffairs, 2002) 6.

³² “The National Bioethics Advisory Commission (NBAC) was established by Executive Order 12975 in October 1995 to advise the National Science and Technology Council and other appropriate government entities regarding “bioethical issues arising from research on human biology and behavior.” NBAC was established in response to proposals by the National Institutes of Health (NIH), the Department of Energy, and other research-oriented agencies; recommendations of the Advisory Committee on Human Radiation Experiments (ACHRE); and a recognized need by the White House Office of Science and Technology Policy (OSTP) for a national commission to address a broad set of ethical issues, including genetic privacy and the protection of human research subjects. NBAC met for the first time on October 4, 1996. On October 3, 2001, the commission's charter expired, and NBAC's tenure ended. Over that five-year period, NBAC met 48 times and submitted six major reports to the White House. NBAC's six reports covered topics ranging from cloning human beings and stem cell research to research with human biological materials and the protection of human participants in research”. (Elisha Eiseman, The National Bioethics Advisory Commission : Contributing to Public Policy / (Santa Monica, CA: Rand, 2003) iii, Questia, 16 Dec. 2005 <http://www.questia.com/PM.qst?a=o&d=102611698>).

³³ Elisha Eiseman, The National Bioethics Advisory Commission : Contributing to Public Policy / (Santa Monica, CA: Rand, 2003) 21.

³⁴ President's Council, *id* at 93.

³⁵ The report notes that "human dignity is at stake" (*Id* at 118)

³⁶ Peter Berkowitz, "The Pathos of the Kass Report," Policy Review, Questia, 16 Dec. 2005 <<http://www.questia.com/PM.qst?a=o&d=5000848513>>.

³⁷ The "precedential effect" says that a previous guideline used in the past not only resolve past controversies; but it is also a rule for future discussions.